

ORDINANCE NO. 20140327-019

AN ORDINANCE GRANTING AT&T CORP A LICENSE UNDER CHAPTER 14-11 OF THE CITY CODE FOR PRIVATE USE OF PUBLIC RIGHTS-OF-WAY; REPEALING ORDINANCE NOS. 850627-Z, 880505-F, 000928-33, AND 0010125-15.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF AUSTIN:

PART 1. GRANT OF LICENSE.

Section 1. PURPOSE.

- (A) This ordinance grants AT&T CORP. (hereinafter "Licensee") a license for the placement of an underground fiber-optic communications cable and related underground facilities for long distance transmission service in the public rights-of-way within the specific areas shown on Exhibit A, replacing a prior expired license first granted to AT&T in 1985, as amended in 1988, then renewed and amended in 2000 and 2001.
- (B) Licensee agrees to comply with the provisions of this ordinance, and unless expressly waived by this ordinance, all City Code and City rules and regulations related to activities of Licensee within the public rights-of-way. The scope of the licensed use is limited to the placement of facilities to provide long distance transmission services. Use of the facilities for any other purpose beyond the scope of this license is not allowed unless provided by a separate grant of such right.

Section 2. DEFINITIONS.

DIRECTOR means the City of Austin Director of Public Works or his or her duly authorized representative.

FACILITIES means the underground wires, cables, conduit, manholes or other structures or appurtenances necessary for Licensee's long distance transmission services.

LONG DISTANCE TRANSMISSION SERVICES means transport across Licensee's facilities located within the City of Austin corporate limits of analog or digital signals for telecommunications originated or terminated outside of the Austin local service area; excluding local exchange service or delivery of any ancillary service by means of any local network.

LICENSED RIGHT-OF-WAY means that certain length of City right-of-way identified on Exhibit A, attached and incorporated, being the total surface area, and the area below and above the surface of the right-of-way, between the property lines that is dedicated, deeded, reserved by plat or otherwise owned or controlled by the City for use by the public for pedestrian or vehicular travel.

Section 3. CONSTRUCTION OBLIGATIONS.

- (A) Licensee is subject to the police powers of the City, other governmental powers, and the City's rights as a property owner under state and federal laws. Licensee is subject to City requirements and federal and state rules in connection with the exercise of its rights created by this license.
- (B) Licensee shall place the facilities underground according to applicable City requirements.
- (C) At the City's request, Licensee shall furnish the City accurate and complete information relating to the construction, reconstruction, removal, maintenance, operation and repair of the facilities performed by Licensee in the licensed right-of-way. If any information furnished is erroneous as to the location of facilities, and reliance on this information results in construction delays or additional expenses, Licensee shall be liable for the cost of delays and the additional expenses.
- (D) The construction, expansion, reconstruction, excavation, use, maintenance and operation of Licensee's facilities and property are subject to applicable City requirements and, unless a more restrictive regulation is otherwise provided by applicable City Code, will comply with the following:
 - (1) Licensee shall perform excavations and other construction in the public right-of-way in accordance with all applicable City requirements, including the obligation to use trenchless technology whenever possible. The Director may waive the requirement to use trenchless technology if in the Director's discretion the Director determines that field conditions warrant a waiver. Licensee shall minimize interference with the use of public and private property and shall follow the construction directions given by the City;
 - (2) Licensee may excavate only for the construction, installation, expansion, repair, removal, and maintenance of Licensee's facilities. When Licensee completes construction work, Licensee shall promptly restore the public right-of-way in accordance with applicable City requirements;

- (3) Licensee shall furnish the Director with construction plans and maps showing the routing of new construction at least 45 days before beginning construction that involves an alteration to the surface or subsurface of the public right-of-way. Licensee may not begin construction until the plans and drawings have been approved in writing by the Director;
 - (4) Licensee shall participate in the Austin Utility Location and Coordination Committee, (AULCC) meetings for the coordination of all construction activities affecting the licensed rights-of-way. Licensee shall identify its facilities on submitted plans and drawings with marks established by the AULCC;
 - (5) If the Director declares an emergency and requests the removal or abatement of facilities, by written notice, Licensee shall remove or abate Licensee's facilities by the reasonable deadline provided in the Director's request. Licensee and the City shall cooperate to the extent possible to assure continuity of service. If Licensee, after facsimile or telephone notice, fails or refuses to remove or abate Licensee's facilities by the date provided in the Director's request, the City may remove or abate the facility, at the sole cost and expense of Licensee, without paying compensation to Licensee and without the City incurring liability for damages; and
 - (6) Licensee may not excavate the pavement of a street or public right-of-way without first complying with City requirements.
- (E) The City shall charge Licensee applicable permitting and inspection fees established by ordinance in accordance with City policy. Licensee may prepay all permitting and inspection fees on a yearly basis. Payments shall be based upon the prior year's experience and shall be reconciled at year's end.

Section 4. CONDITIONS OF RIGHT-OF-WAY USE.

- (A) In the exercise of its governmental or proprietary functions, the City has first priority over all other uses of the licensed right-of-way. The City reserves the right to lay sewer, gas, water, and other pipe lines or cables and conduits, and to do underground and overhead work, and attachment, restructuring or changes in facilities in, across, along, over or under a public street, alley, or right-of-way occupied by Licensee, and to change the curb, sidewalks or the grade of streets.

- (B) The license granted to Licensee is non-exclusive. If however, during the term of the license, the City authorizes the owner of abutting real property, other than the City, to occupy space under the surface of any public right-of-way, the grant to an abutting landowner shall be subject to the rights of Licensee described in this ordinance.
- (C) If the City's closure or abandonment of all or any portion of the licensed right-of-way is determined to include an area occupied by a portion of Licensee's facilities, the City shall make all reasonable efforts to identify other public rights-of-way suitable for placement of the facilities should Licensee be unsuccessful in obtaining rights in the closed or abandoned licensed right-of-way.

Section 5. INDEMNITY AND INSURANCE.

- (A) During the term of this license, Licensee shall be liable for the acts or omissions of an entity used by Licensee, including an affiliate, when the entity is involved directly or indirectly in the construction and installation of Licensee's facilities. The acts or omissions of the entity shall be considered the acts or omissions of Licensee.
- (B) Licensee shall, and agrees to, defend, indemnify and hold the City harmless against all damages, cost, loss or expense arising out of, incident to, concerning or resulting from the negligence or willful misconduct of Licensee, its agents, employees, or subcontractors, in the performance of activities under this license for:
 - (1) the repair, replacement, or restoration of City property, equipment materials, structures and facilities which are damaged, destroyed or found to be defective; and
 - (2) any and all claims, demands, suits, causes of action, and judgments for:
 - (a) damage to or loss of the property of any person including, but not limited to Licensee, its agents, officers, employees and subcontractors, the City's agents, officers and employees, and third parties; and
 - (b) death, bodily injury, illness, disease, worker's compensation, loss of services, or loss of income or wages to any person including but not limited to the agents, officers and employees of Licensee, Licensee's subcontractors, the City, and third parties, no matter how, or to whom, the loss may occur.

- (C) The Director shall give prompt written notice to Licensee of any claim for which the City seeks indemnification. Licensee shall have the right to investigate and defend these claims with written notice to the City Attorney. Settlement or compromise of any such claim must have prior approval of the City Attorney.
- (D) Licensee shall, at its sole expense, provide commercial general liability insurance covering claims arising from the activities of Licensee, its officers, employees, agents, or contractors, relative to this license. Limit shall be \$4 million per occurrence and in the aggregate and City of Austin shall be an additional insured. A certificate of insurance evidencing this coverage shall be delivered to the City on or before the effective date of the ordinance. Licensee may self-insure the required coverage.

Section 6. RECORDS.

- (A) Licensee shall keep complete and accurate maps, construction drawings and specifications describing the location of facilities. The maps, construction drawings and specifications shall provide for separate and specific identification of those facilities located in the licensed right-of-way and shall be kept and maintained within the city limits of Austin.
- (B) The City shall have the right, at reasonable times and with reasonable notice, to inspect the maps, construction drawings and specifications. Licensee shall fully cooperate in making available its maps, construction drawings, and specifications for inspection by authorized representatives of the City.
- (C) The City shall maintain confidentiality of all competitively sensitive information to the extent required by law. Prior to releasing any information designated as confidential or proprietary by Licensee, the City shall provide notice to Licensee allowing it an opportunity request that the Attorney General opine as to whether the requested information must be made public.

Section 7. NOTICE.

- (A) The City Manager or his duly authorized representative is the City official responsible for the administration of this ordinance. Licensee shall direct questions regarding the interpretation or application of this ordinance to the office of the City Manager.
- (B) All notices to the City shall be sent by certified or registered United States mail, return receipt requested, or by a recognized overnight delivery service, or by hand delivery, postage or delivery charges prepaid, and addressed to:

The City Of Austin Texas
c/o: Office of Telecommunications and Regulatory Affairs
P.O. Box 1088
Austin, Texas 78767

with a copy to:

City of Austin Law Department
P.O. Box 1088
Austin, Texas 78767-8828

or to any other address the City may designate from time to time by written notice.

- (C) All notices to Licensee shall be sent by certified or registered United States mail, return receipt requested, or by a recognized overnight delivery service, or by hand delivery, postage or delivery charges prepaid, and addressed to:

AT&T Corp.
Attn: Right of Way Group, Room 162
3450 Riverwood Parkway SE
Atlanta, GA 30339

with a copy to:

AT&T
One AT&T Way
Room 3A118A
Bedminster, NJ 07921
Attention: Legal Department – Network Services

or to any other address Licensee may designate from time to time by written notice.

Section 8. ASSIGNMENT.

This license shall not be assigned without the express consent of the City Council of the City of Austin, except that Licensee may assign its rights under this ordinance to a parent, subsidiary, or affiliate entity without the City's consent, so long as the parent, subsidiary, or affiliate is under common ownership and control with Licensee.

Section 9. TERMINATION.

- (A) This license may be terminated by Licensee by delivering written notice to the Austin City Manager at least sixty days before the effective date of termination, provided Licensee ceases provision of long distance transmission services within the sixty-day period.
- (B) In the event of termination by Licensee under this section, Licensee may remove its facilities from the licensed public properties provided the licensed rights-of-way is left in the same or better condition as before.
- (C) If Licensee fails to abide by the by the terms of this Agreement, the City will deliver written notice to Licensee setting forth notice of the default. Licensee shall have 45 days after receipt of such default notice to cure the failure and if Licensee does not cure such failure within such 45 day period, then the City may terminate this license by delivering written notice to Licensee at least 15 days prior to the effective date of such termination.

Section 10. TERM, RENEWAL, AND AMENDMENTS.

- (A) The term of this license for ten years beginning on October 9, 2013 and ending on October 8, 2023.
- (B) Licensee has an option to renew this license for one additional three-year term on the same terms and conditions, provided Licensee has fully complied with the terms and conditions in this ordinance. Licensee must file a written notice to the City of its election to exercise the renewal option at least six months prior to the expiration of the original term of this license.
- (C) Licensee and the City agree to begin good faith negotiations for a new license no later than six months before the expiration of this license. If, on the expiration date of this license, Licensee has failed to obtain rights necessary to keep its facilities in the right-of-way, the City may (1) purchase the facilities at the fair market value, as described in Section 11, (2) request Licensee to remove the facilities, or (3) allow Licensee to abandon the facilities.

Section 11. CITY'S RIGHT TO PURCHASE THE FACILITIES.

- (A) In accordance with the City Charter, the City shall have the right to purchase Licensee's facilities in the licensed right-of-way.

- (B) If the City elects to exercise its right to purchase Licensee facilities, the City shall notify Licensee in writing at least 90 days before the effective date of the purchase. Licensee and the City shall each designate an appraiser experienced and knowledgeable in the valuation of similar networks. The two appraisers shall designate a third appraiser. Each appraiser shall conduct an independent appraisal of the fair market value of Licensee facilities as a going concern as of the effective date of the purchase by the City. Licensee and the City shall be responsible for the appraisal fees of its own appraisers and pay an equal share of the appraisal fee of the third appraiser. The appraisers shall consider, among other factors, the book value of the assets constituting Licensee facilities, the age and condition of the physical plant and equipment and the discounted future revenue stream considering the customer base, discounted in accord with general appraisal practice, for the remaining useful life of the assets constituting Licensee facilities. The appraisers may not consider value of the unexpired term or the potential renewal of the license itself. The purchase price to be paid by the City shall be the price agreed to by at least two of the three appraisers and in the event none of the appraisal values are the same, then the price will be the average of the two closest values established by the three appraisers.
- (C) Licensee recognizes that the provisions of the City's Charter require inclusion of this section in this ordinance. Licensee, however, does not waive but reserves the right to challenge the charter provision, this section, or any application of this section on any basis, including as a violation of the Constitution and laws of the United States or the State of Texas.

Section 12. ANNUAL LICENSE FEE.

- (A) Licensee shall pay an annual license fee for the right to use the licensed right-of-way. The first annual license fee payment of \$169,214.61, corresponding to a fee of \$4.74 per linear foot, shall be tendered on or before the effective date of this ordinance. Each subsequent annual fee shall be due on October 9th of each year of the term. Each annual fee shall be an amount equal to the prior year's annual fee multiplied by 1.04.
- (B) Each past due payment shall bear interest at the rate of nine percent a year until fully paid or legally discharged.
- (C) Payment shall be delivered to: City of Austin, Telecommunications and Regulatory Affairs, P.O. Box 1088, Austin, Texas 78767.

